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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 OUDOM SOMEЕ,

13 Defendant.

Case No. 2:10-cr-00273-MMD-CWH

ORDER

(Plf.'s Motion in Limine – dkt. no. 57;  
Plf.'s Motion in Limine – dkt. no. 58;  
Def.'s Motion to Extend Time  
– dkt. no. 77)

14  
15 **I. SUMMARY**

16 Before the Court are Plaintiff United States of America's two Motions in Limine  
17 (dkt. nos. 57 and 58), as well as Defendant Oudom Somee's Unopposed Motion for  
18 Leave to File Late Supplemental Points and Authorities (dkt. no. 77).

19 **II. BACKGROUND**

20 On June 15, 2010, the United States filed an Indictment against Defendant  
21 Somee charging Somee with conspiracy to commit wire fraud in connection with an  
22 alleged scheme to fraudulently obtain money and property from mortgage companies  
23 and federally insured financial institutions. (Dkt. no. 1.) The United States filed a  
24 Superseding Indictment on February 16, 2011, to add additional mail fraud, wire fraud,  
25 and bank fraud counts against Somee. (See dkt. no. 25.)

26 **III. LEGAL STANDARD**

27 A motion in limine is a request for the court's guidance concerning an evidentiary  
28 question. See *Wilson v. Williams*, 182 F.3d 562, 570 (7th Cir. 1999). Judges have

1 broad discretion when ruling on motions in limine. See *Jenkins v. Chrysler Motors Corp.*,  
2 316 F.3d 663, 664 (7th Cir. 2002). However, a motion in limine should not be used to  
3 resolve factual disputes or weigh evidence. See *C & E Servs., Inc., v. Ashland, Inc.*, 539  
4 F. Supp. 2d 316, 323 (D.D.C. 2008). To exclude evidence on a motion in limine, “the  
5 evidence must be inadmissible on all potential grounds.” See, e.g., *Ind. Ins. Co. v. Gen.*  
6 *Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). “Unless evidence meets this high  
7 standard, evidentiary rulings should be deferred until trial so that questions of  
8 foundation, relevancy and potential prejudice may be resolved in proper context.”  
9 *Hawthorne Partners v. AT & T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). This  
10 is because although rulings on motions in limine may save “time, costs, effort and  
11 preparation, a court is almost always better situated during the actual trial to assess the  
12 value and utility of evidence.” *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1219 (D.  
13 Kan. 2007).

14 In limine rulings are provisional. Such “rulings are not binding on the trial judge  
15 [who] may always change his mind during the course of a trial.” *Ohler v. United States*,  
16 529 U.S. 753, 758 n. 3 (2000); accord *Luce*, 469 U.S. at 41 (noting that in limine rulings  
17 are always subject to change, especially if the evidence unfolds in an unanticipated  
18 manner). “Denial of a motion in limine does not necessarily mean that all evidence  
19 contemplated by the motion will be admitted to trial. Denial merely means that without  
20 the context of trial, the court is unable to determine whether the evidence in question  
21 should be excluded.” *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

### 22 **III. DISCUSSION**

#### 23 **A. Plaintiff’s Motion to Exclude Evidence (dkt. no. 57)**

24 The government’s first Motion seeks to exclude four types of evidence: (1)  
25 evidence of lender negligence; (2) evidence that others engaged in similar practices as  
26 Somee; (3) evidence regarding belief that the lender would not be harmed; and (4)  
27 evidence of the state of the economy or real estate market during the times relevant to  
28 this indictment. (See dkt. no. 57 at 1.) Somee did not oppose this Motion.

1                   **1.     Lender negligence**

2                   Materiality of falsehood is an element of the federal bank and wire fraud statutes.  
3                   *Neder v. United States*, 527 U.S. 1, 25 (1999). A material false statement is defined as  
4                   one that “has a natural tendency to influence, or is capable of influencing, the decision of  
5                   the decisionmaking body to which it was addressed.” *Id.* at 16 (quoting *United States v.*  
6                   *Gaudin*, 515 U.S. 506, 509 (1995)).

7                   Justifiable reliance and damages are not required, so the government need not  
8                   prove that the victim relied on the false statements or was damaged by them. *Neder*,  
9                   527 U.S. at 24-25. For this reason, “it is no defense to wire fraud or bank fraud that the  
10                  victim of the fraud was negligent, gullible, or incompetent.” *United States v. Maximov*,  
11                  No. CR10-822, 2011 WL 4915162, at \*2 (D. Ariz. Oct. 17, 2011).

12                  Moreover, a misrepresentation may be material even if evidence demonstrates  
13                  that the misrepresentation would not have actually influenced or actually deceived the  
14                  lender. See *United States v. Rashid*, 383 F.3d 769, 778-79 (8th Cir. 2004), *cert.*  
15                  *granted, judgment vacated on other grounds by Abu Nahia v. United States*, 546 U.S.  
16                  803 (2005). What matters is whether the misrepresentation had a “natural tendency to  
17                  influence the bank or was not capable of influencing the bank.” *Id.*

18                  However, in order to determine materiality, a jury “must know something about the  
19                  lenders’ decision-making process.” *Maximov*, 2011 WL 4915162, at \*3. “[A]lthough [a]  
20                  [d]efendant cannot rely on loose lending practices of victim financial institutions as a  
21                  defense to fraud, he can challenge the government’s evidence concerning applicable  
22                  lending standards and thereby challenge the government’s assertion that the false  
23                  statements were material.” *Id.*

24                  As a result, evidence of lender policies or practices that do not consider certain  
25                  facts – such as those allegedly misrepresented by Somee – is relevant and admissible  
26                  to show that the facts were not material. For example, if the lender’s policies or  
27                  practices did not restrict the amount of real estate commission paid, the fact that Somee  
28                  may have falsely misrepresented the amount of such commission is not material,

1 rendering such evidence of such policies or practices relevant. Accordingly, this Order  
2 prohibits any attempt by Somee to introduce evidence of lender negligence. However,  
3 any evidence of lending practices introduced to refute materiality is admissible. The  
4 Court may draw additional lines between what evidence falls within the type of lender  
5 negligence and loose lending practices that will be excluded during trial as evidence is  
6 actually presented.

## 7 **2. Fraud committed by others**

8 The United States also seeks to exclude evidence of other people engaging in  
9 similar schemes to defraud, arguing in one sentence that such evidence is irrelevant to  
10 the actions of this defendant. Without more detail as to what type of evidence the  
11 government seeks to exclude, the Court cannot grant such a blanket prohibition. It is  
12 entirely possible that evidence of others engaging in conduct similar to Somee would be  
13 somehow relevant for Somee's trial. Although the Court will not speculate as to what  
14 such evidence might be probative of, neither will the Court exclude evidence without  
15 some demonstration of what that evidence will be and how it might relate to Somee's  
16 defense. As motions in limine are provisional, the government may bring this request at  
17 a later time if and when it seeks to exclude specific evidence.

## 18 **3. Belief of harm to lender**

19 The Motion additionally seeks to exclude evidence that Somee believed that the  
20 lender that he allegedly defrauded would not be harmed. The Court denies this request  
21 for the simple reason that fraud requires, as an essential element, an intent to defraud.  
22 As the United States itself quoted, "an honest, good-faith belief in the truth of the  
23 misrepresentations may negate intent to defraud . . . ." *United States v. Molinaro*, 11  
24 F.3d 853, 863 (9th Cir. 1993). It is again unclear what type of evidence the government  
25 seeks to exclude. If Somee seeks to introduce evidence that he did not believe the  
26 government would be harmed, and as a result did not believe that his actions would  
27 defraud the lender, that evidence would be probative as to whether he harbored  
28 fraudulent intent. Similarly, a belief that the government would not to be harmed might

1 be relevant as to whether he thought his conduct constituted misrepresentations, or as  
2 to whether he believed he was representing truthful information that the government  
3 argues was false. Again, the Court will not speculate as to what the evidence in this  
4 case demonstrates. It is up to the government to provide the Court with enough details  
5 to enable the Court to make a reasoned assessment of the admissibility of the evidence.

#### 6 **4. Decline in real estate market**

7 The United States also seeks to exclude any evidence that shows the decline in  
8 the real estate market or the local economy since 2006. It argues that since potential  
9 financial success of a fraudulent scheme does not negate an intent to defraud, evidence  
10 of the market's decline is irrelevant and potentially confusing. While it is true that  
11 potential success of the scheme is irrelevant to a successful fraud prosecution, see  
12 *United States v. Rude*, 88 F.3d 1538, 1547 (9th Cir. 1996), it is unclear how proffering  
13 evidence of the worsening economy seeks to establish success or failure of the scheme.  
14 Again, the government's Motion is short on facts that would allow the Court to determine  
15 the relevance – or lack thereof – of the evidence the government seeks to exclude.

16 In sum, Somee will be barred from introducing evidence of lender negligence or  
17 lending practices as a defense. The government's requests to exclude the other forms  
18 of evidence is denied.

#### 19 **B. Plaintiff's Motion to Exclude Expert Testimony (dkt. no. 58)**

20 The United States seeks an order to exclude Somee's proffered expert witness  
21 testimony from Dr. Thomas F. Kinsora on the ground that Somee failed to provide  
22 sufficient notice under Fed. R. Crim. P. 16 and on the grounds that the testimony failed  
23 to meet the requirements of FRE 702 and *Daubert*.

#### 24 **1. Notice**

25 Fed. R. Crim. P. 12.2(a) requires that a criminal defendant "who intends to assert  
26 a defense of insanity at the time of the alleged offense must so notify an attorney for the  
27 government in writing" within a set time as stated in the rule. Similarly, Fed. R. Crim. P.  
28 12.2(b) requires a similar notice if the defendant "intends to introduce expert evidence

1 relating to a mental disease or defect or any other mental condition of the defendant  
2 bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital  
3 case . . . .” Somee provided notice as to both rules in his September 11, 2012, filing.  
4 (Dkt. no. 55.)

5 Pursuant to Fed. R. Crim. 16(b)(1)(C), which provides that a criminal defendant  
6 must give to the government a written summary of the evidence it intends to introduce at  
7 trial, the government sought Somee’s expert witness report. After receiving the report of  
8 Dr. Kinsora (dkt. no. 59), the government filed this Motion arguing that the report does  
9 not set forth any opinions that would challenge the mental state requirement for the  
10 crimes with which Somee is charged. Somee counters by arguing that the government  
11 has had sufficient notice of the report, and cannot exclude it for failure to provide  
12 adequate notice.

13 A review of Dr. Kinsora’s report demonstrates that the government’s notice  
14 argument fails. The government first seeks exclusion because it argues that the report  
15 does not state any opinion as to whether Somee was insane at the time of the fraud  
16 alleged in the Superseding Indictment. The government can point to no authority that  
17 requires this expert to opine on what he believed to be Somee’s mental capacity  
18 between 2006 and late 2007, the time period in which Somee allegedly engaged in the  
19 criminal activity. At the very least, Dr. Kinsora’s report is probative of this issue; to the  
20 extent that Somee exhibits some cognitive deficiencies at the time of Dr. Kinsora’s  
21 evaluation, he is more likely to have exhibited those same deficiencies during the time  
22 period relevant to the indictment.

23 The government also seeks exclusion because it contends that the expert report  
24 contains “[n]o opinion . . . that would negate an ability to formulate the requisite intent” to  
25 defraud. (Dkt. no. 58 at 3.) This statement grossly misrepresents the expert testimony.  
26 In the very same paragraph that the government quotes in its Motion, Dr. Kinsora begins  
27 with the observation that “there is little doubt that [the complex loan] material is far above  
28 his capacity” to understand, and that “it is not clear at all that he recognizes how his own

1 actions might be illegal.” (Dkt. no. 58-A at 10.) That Somee conceded in his interviews  
2 with Dr. Kinsora that a co-schemer “*could* have been qualifying loan applications  
3 illegally” does not destroy the very conclusions that the report makes about Somee’s  
4 mental capacity. (*Id.* (emphasis added.)) The government can contest the conclusion  
5 that Dr. Kinsora reached about Somee’s capacity to understand the complex loan  
6 documents, and can introduce evidence to the jury to persuade them of Somee’s intent  
7 to defraud, but it cannot ask this Court to remove from consideration this evidence based  
8 on its misreading of the report.

## 9                   2.       Admissibility of evidence

10           The United States also seeks to exclude the expert report on the ground that it  
11 does not meet the requirements of FRE 702 and *Daubert v. Merrel Dow Pharms., Inc.*,  
12 509 U.S. 579 (1993) for the introduction of expert testimony. The government points to a  
13 passage in the report which admits that “standardized normative data” is unavailable to  
14 compare his performance to other citizens of Loas, where Somee emigrated from. (See  
15 dkt. no. 58-A at 7.) Instead, the report highlighted that Somee’s scores were compared  
16 to English-speaking high school educated United States citizens, and consequently  
17 “should not be used to indicate brain damage or neurological problems, but can help to  
18 compare his abilities next to same aged U.S. citizens.” *Id.* Based on this passage, the  
19 government argues that the failure to test the results of the cognitive examination with  
20 standardized normative data renders the report’s findings unreliable, which should result  
21 in their exclusion. Somee responds by merely – and insufficiently – relying only on the  
22 relevance of the testimony, but failing to demonstrate that Dr. Kinsora’s testimony meets  
23 the requirements of FRE 702.<sup>1</sup>

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25           <sup>1</sup>The Court ordered supplemental briefing on the issue of whether Dr. Kinsora’s  
26 expert report meets the requirements of FRE 702 and *Daubert*. (See dkt. no. 75.)  
27 Somee filed his response late, but the Court grants his Motion to Extend Time. (See dkt.  
28 no. 77.) Somee responded to the order, but failed again to adequately lay the  
foundation for this evidence, instead focusing only on relevance. (See dkt. no. 78 at 8-  
9.)

1 FRE 702 provides as follows:

2 A witness who is qualified as an expert by knowledge, skill, experience,  
training, or education may testify in the form of an opinion or otherwise if:

- 3 (a) the expert's scientific, technical, or other specialized knowledge  
4 will help the trier of fact to understand the evidence or to  
determine a fact in issue;  
5 (b) the testimony is based on sufficient facts or data;  
6 (c) the testimony is the product of reliable principles and methods;  
and  
7 (d) the expert has reliably applied the principles and methods to the  
facts of the case.

8 Rule 702 should be applied consistent with the “liberal thrust” of the Federal Rules and  
9 their “general approach of relaxing the traditional barriers to ‘opinion testimony.’”  
10 *Daubert*, 509 U.S. at 588 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169  
11 (1988)).

12 The trial court is accorded wide discretion when acting as gatekeepers for the  
13 admissibility of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137,  
14 151-52 (1999). The court must first determine if a witness has the required expertise,  
15 whether it be “knowledge, skill, experience, training, or education” under FRE 702(a).  
16 Next, the court assesses the content of the expert’s proffered testimony to determine  
17 whether the proffered testimony is both relevant and reliable. *Luttrell v. Novartis Pharm.*  
18 *Corp.*, \_\_ F. Supp. 2d \_\_, 2012 WL 4513109, at \*4 (E.D. Wash. Oct. 1, 2012) (citations  
19 omitted). The court analyses “whether the reasoning or methodology underlying the  
20 testimony is scientifically valid, and [ ] whether that reasoning or methodology properly  
21 can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592. Factors to be  
22 considered when determining if the testimony is reliable scientific knowledge are whether  
23 the theory or technique is generally accepted in the relevant scientific community,  
24 whether it has been subjected to peer review and publication, whether it can be and has  
25 been tested, whether standards exist to control the technique’s operations, and whether  
26 the known or potential rate of error is acceptable. *Id.* at 593-94. The inquiry, however, is  
27 a flexible one, with the focus solely on the principles and methodology used, not on the  
28 conclusions they generate. *Id.* at 594. For that reason, “the test under *Daubert* is not



1 the correctness of the expert's conclusions but the soundness of his methodology."  
2 *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).

3 A review of Dr. Kinsora's report shows that it fails to meet the requirements of  
4 Fed. R. Crim. 16(b)(1)(C), which requires that the defendant provide "a written summary  
5 of any testimony that the defendant intends to use under Rules 702, 703, and 705 of the  
6 Federal Rules of Evidence at trial." The summary must include a description of "the  
7 witness's opinion, the bases and reasons for those opinions, and the witness's  
8 qualifications." Fed. R. Crim. 16(b)(1)(C)(ii). In addition, no *Daubert* evidence  
9 demonstrating the reliability and soundness of the methodology employed by Dr. Kinsora  
10 has been offered. While it is not the Court's role to determine the probative value of that  
11 evidence for Somee's defense, it must be assured of the soundness of Dr. Kinsora's  
12 methodology. Without this threshold showing, Dr. Kinsora's testimony is excluded.


13 **III. CONCLUSION**

14 Accordingly, IT IS THEREFORE ORDERED that Plaintiff United States of  
15 America's Motion to Exclude Evidence (dkt. no. 57) is GRANTED in part and DENIED in  
16 part.

17 IT IS FURTHER ORDERED that the United States of America's Motion to  
18 Exclude Expert Testimony (dkt. no. 58) is GRANTED.

19 IT IS FURTHER ORDERED that Defendant Oudom Somee's Unopposed Motion  
20 for Leave to File Late Supplemental Points and Authorities (dkt. no. 77) is GRANTED.

21  
22 DATED THIS 9<sup>th</sup> day of November 2012.

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25 \_\_\_\_\_  
26 MIRANDA M. DU  
27 UNITED STATES DISTRICT JUDGE  
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